

## Surface Transportation Board, DOT

## § 1108.1

than 60 days from the date the application is filed with the Board.

(b) The proposed SIP shall be made part of the environmental record in the Board proceeding and dealt with in the ongoing environmental review process under 49 CFR part 1105. The procedures governing the process shall be as follows:

(1) In accordance with 49 CFR 244.17, FRA will provide its findings and conclusions on the adequacy of the proposed SIP (*i.e.*, assess whether the proposed SIP establishes a process that provides a reasonable assurance of safety in executing the proposed transaction) to SEA at a date sufficiently in advance of the Board's issuance of its draft environmental documentation in the case to permit incorporation in the draft environmental document.

(2) The draft environmental documentation shall incorporate the proposed SIP, any revisions or modifications to it based on further consultations with FRA, and FRA's written comments regarding the SIP. The public may review and comment on the draft environmental documentation within the time limits prescribed by SEA.

(3) SEA will independently review each proposed SIP. In its final environmental documentation, SEA will address written comments on the proposed SIP received during the time established for submitting comments on the draft environmental documentation. The Board then will consider the full environmental record, including the information concerning the SIP, in arriving at its decision in the case.

(4) If the Board approves the transaction and adopts the SIP, it will require compliance with the SIP as a condition to its approval. Each applicant involved in the transaction then shall coordinate with FRA in implementing the approved SIP, including any amendments thereto. FRA has provided in its rules at 49 CFR 244.17(g) for submitting information to the Board during implementation of an approved transaction that will assist the Board in exercising its continuing jurisdiction over the transaction. FRA also has agreed to advise the Board when, in its view, the integration of the applicants' operations has been safely completed.

(c) If a SIP is required in transactions that would not be subject to environmental review under the Board's environmental rules at 49 CFR part 1105, the Board will develop appropriate case-specific SIP procedures based on the facts and circumstances presented.

### § 1106.5 Waiver.

The SIP requirements established by this part may be waived or modified by the Board where a railroad shows that relief is warranted or appropriate.

### § 1106.6 Reservation of Jurisdiction.

The Board reserves the right to require a SIP in cases other than those enumerated in this part, or to adopt modified SIP requirements in individual cases, if it concludes that doing so is necessary in its proper consideration of the application or other request for authority.

## PART 1107 [RESERVED]

## PART 1108—ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

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AUTHORITY: 49 U.S.C. 721(a) and 5 U.S.C. 571 *et seq.*

SOURCE: 78 FR 29079, May 17, 2013, unless otherwise noted.

### § 1108.1 Definitions.

As used in this part:

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(a) *Arbitrator* means a single person appointed to arbitrate pursuant to these rules.

(b) *Arbitrator Panel* means a group of three people appointed to arbitrate pursuant to these rules. One panel member would be selected by each side to the arbitration dispute, and the parties would mutually agree to the selection of the third-neutral arbitrator under the “strike” methodology described in § 1108.6(c).

(c) *Arbitration program* means the program established by the Surface Transportation Board in this part under which participating parties, including rail carriers and shippers, have agreed voluntarily in advance, or on a case-by-case basis to resolve disputes about arbitration-program-eligible matters brought before the Board using the Board’s arbitration procedures.

(d) *Arbitration-program-eligible matters* are those disputes or components of disputes, that may be resolved using the Board’s arbitration program and include disputes involving one or more of the following subjects: Demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier’s published rules and practices as applied to particular rail transportation.

(e) *Counterclaim* is an independent arbitration claim filed by a respondent against a complainant arising out of the same set of circumstances or is substantially related to the underlying arbitration complaint and subject to the Board’s jurisdiction.

(f) *Final arbitration decision* is the unredacted decision served upon the parties 30 days after the close of the arbitration’s evidentiary phase.

(g) *Interstate Commerce Act* means the Interstate Commerce Act as amended by the ICC Termination Act of 1995.

(h) *Monetary award cap* means a limit on awardable damages of \$200,000 per case, unless the parties mutually agree to a different award cap. If parties bring one or more counterclaims, such counterclaims will be subject to a separate monetary award cap of \$200,000 per case, unless the parties mutually agree to a different award cap.

(i) *Neutral Arbitrator* means the arbitrator selected by the strike methodology outlined in § 1108.6(c).

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(j) *Statutory jurisdiction* means the jurisdiction conferred on the STB by the Interstate Commerce Act, including jurisdiction over rail transportation or services that have been exempted from regulation.

(k) *STB* or *Board* means the Surface Transportation Board.

### § 1108.2 Statement of purpose, organization, and jurisdiction.

(a) *The Board’s intent.* The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This section provides for the creation of a binding, voluntary arbitration program in which parties, including shippers and railroads, agree in advance to arbitrate certain types of disputes with a limit on potential liability of \$200,000 unless the parties mutually agree to a different award cap. The Board’s arbitration program is open to all parties eligible to bring or defend disputes before the Board.

(1) Except as discussed in paragraph (b) of this section, parties to arbitration may agree by mutual written consent to arbitrate additional matters and to a different amount of potential liability than the monetary award cap identified in this section.

(2) Nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

(b) *Limitations to the Board’s Arbitration Program.* These procedures shall not be available for disputes involving labor protective conditions, which have their own procedures. These procedures shall not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters. Parties may only use these arbitration procedures to arbitrate matters within the statutory jurisdiction of the Board.

### § 1108.3 Participation in the Board’s arbitration program.

(a) *Opt-in procedures.* Any rail carrier, shipper, or other party eligible to bring or defend disputes before the Board

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may at any time voluntarily choose to opt into the Board's arbitration program. Opting in may be for a particular dispute or for all potential disputes before the Board unless and until the party exercises the opt-out procedures discussed in § 1108.3(b). To opt in parties may either:

(1) File a notice with the Board, under Docket No. EP 699, advising the Board of the party's intent to participate in the arbitration program. Such notice may be filed at any time and shall be effective upon receipt by the Board.

(i) Notices filed with the Board shall state which arbitration-program-eligible issue(s) the party is willing to submit to arbitration.

(ii) Notices may, at the submitting party's discretion, provide for a different monetary award cap.

(2) Participants to a proceeding, where one or both parties have not opted into the arbitration program, may by joint notice agree to submit an issue in dispute to the Board's arbitration program.

(i) The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a different amount than the Board's \$200,000 monetary award cap.

(b) *Opt-out procedures.* Any party who has elected to participate in the arbitration program may file a notice at any time under Docket No. EP 699, informing the Board of the party's decision to opt out of the program or amend the scope of its participation. The notice shall take effect 90 days after filing and shall not excuse the filing party from arbitration proceedings that are ongoing, or permit it to withdraw its consent to participate in any arbitration-program-eligible dispute associated with their opt-in notice for any matter before the Board at any time within that 90 day period before the opt-out notice takes effect

(c) *Public notice of arbitration program participation.* The Board shall maintain a list of participants who have opted into the arbitration program on its Web site at [www.stb.dot.gov](http://www.stb.dot.gov). Those parties participating in arbitration on a

case-by-case basis will not be listed on the Board's Web site.

### § 1108.4 Use of arbitration.

(a) *Arbitration-program-eligible matters.* Matters eligible for arbitration under the Board's program are: Demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation. Parties may agree in writing to arbitrate additional matters on a case-by-case basis as provided in paragraph (e) of this section.

(b) *Monetary award cap.* Arbitration claims may not exceed the arbitration program award cap of \$200,000 per arbitral proceeding unless:

(1) The defending party's opt-in notice provides for a different monetary cap or;

(2) The parties agree to select a different award cap that will govern their arbitration proceeding. The parties may change the award cap by incorporating an appropriate provision in their agreement to arbitrate.

(3) Counterclaims will not offset against the monetary award cap of the initiating claim. A counterclaim is an independent claim and is subject to a monetary award cap of \$200,000 per case, separate from the initiating claim, or to a different cap agreed upon by the parties in accordance with § 1108.4(b)(2).

(c) *Assignment of arbitration-program-eligible matters.* The Board shall assign to arbitration all arbitration-program-eligible disputes arising in a docketed proceeding where all parties to the proceeding are participants in the Board's arbitration program, or where one or more parties to the matter are participants in the Board's arbitration program, and all other parties to the proceeding request or consent to arbitration.

(d) *Matters partially arbitration-program-eligible.* Where the issues in a proceeding before the Board relate in part to arbitration-program-eligible matters, only those parts of the dispute related to arbitration-program-eligible matters may be arbitrated pursuant to the arbitration program, unless the

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parties petition the Board in accordance with paragraph (e) of this section to include additional disputes.

(e) *Other matters.* Parties may petition the Board, on a case-by-case basis, to assign to arbitration disputes, or portions of disputes, not listed as arbitration-program-eligible matters. This may include counterclaims and affirmative defenses. The Board will not consider for arbitration types of disputes which are expressly prohibited in § 1108.2(b).

(f) *Arbitration clauses.* Nothing in the Board's regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.

### § 1108.5 Arbitration commencement procedures.

(a) *Complaint.* Arbitration under these rules shall commence with a written complaint, which shall be filed and served in accordance with Board rules contained at part 1104 of this chapter. Each complaint must contain a statement that the complainant and the respondent are participants in the Board's arbitration program pursuant to § 1108.3(a), or that the complainant is willing to arbitrate voluntarily all or part of the dispute pursuant to the Board's arbitration procedures, and the relief requested.

(1) If the complainant desires arbitration with a single-neutral arbitrator instead of a three-member arbitration panel, the complaint must make such a request in its complaint.

(2) If the complainant is not a participant in the arbitration program, the complaint may specify the issues that the complainant is willing to arbitrate.

(3) If the complainant desires to set a different amount of potential liability than the \$200,000 monetary award cap, the complaint should specify what amount of potential liability the complainant is willing to incur.

(b) *Answer to the complaint.* Any respondent must, within 20 days of the date of the filing of a complaint, answer the complaint. The answer must state whether the respondent is a participant in the Board's arbitration program, or whether the respondent is

willing to arbitrate the particular dispute.

(1) If the complaint requests arbitration by a single-neutral arbitrator instead of by an arbitration panel, the answer must contain a statement consenting to arbitration by a single-neutral arbitrator or an express rejection of the request.

(i) The respondent may also initiate a request to use a single-neutral arbitrator instead of an arbitration panel.

(ii) Absent the parties agreeing to arbitration through a single-neutral arbitrator, the Board will assign the case to arbitration by a panel of three arbitrators as provided by § 1108.6(a)–(c). The party requesting the single-neutral arbitrator shall at that time provide written notice to the Board and the other parties if it continues to object to a three-member arbitration panel. Upon timely receipt of the notice, the Board shall set the matter for formal adjudication.

(2) When the complaint specifies a limit on the arbitrable issues, the answer must state whether the respondent is willing to resolve those issues through arbitration.

(i) If the answer contains an agreement to arbitrate some but not all of the arbitration issues in the arbitration complaint, the complainant will have 10 days from the date of the answer to advise the respondent and the Board in writing whether the complainant is willing to arbitrate on that basis.

(ii) Where the respondent is a participant in the Board's arbitration program, the answer should further state that the respondent has thereby agreed to use arbitration to resolve all of the arbitration-program-eligible issues in the complaint. The Board will then set the matter for arbitration, and provide a list of arbitrators.

(3) When the complaint proposes a different amount of potential liability, the answer must state whether the respondent agrees to that amount in lieu of the \$200,000 monetary award cap.

(c) *Counterclaims.* In answering a complaint, the respondent may file one or more counterclaims against the complainant if such claims arise out of the same set of circumstances or are substantially related, and are subject

to the Board's jurisdiction as provided in § 1108.2(b). Counterclaims are subject to the assignment provisions contained in § 1108.4(c)–(e). Counterclaims are subject to the monetary award cap provisions contained in § 1108.4(b)(2)–(3).

(d) *Affirmative defenses.* An answer to an arbitration complaint shall contain specific admissions or denials of each factual allegation contained in the complaint, and any affirmative defenses that the respondent wishes to assert against the complainant.

(e) *Arbitration agreement.* Prior to the commencement of an arbitration proceeding, the parties to arbitration together with the neutral arbitrator shall create a written arbitration agreement, which at a minimum will state with specificity the issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed. The agreement may contain other mutually agreed upon provisions.

(1) Any additional issues selected for arbitration by the parties, that are not outside the scope of these arbitration rules as explained in § 1108.2(b), must be subject to the Board's statutory authority.

(2) These rules shall be incorporated by reference into any arbitration agreement conducted pursuant to an arbitration complaint filed with the Board.

#### § 1108.6 Arbitrators.

(a) *Panel of arbitrators.* Unless otherwise requested in writing pursuant to § 1108.5(a)(1), all matters arbitrated under these rules shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators.* The party or parties on each side of an arbitration dispute shall select one arbitrator, and serve notice of the selection upon the Board and the opposing party within 20 days of an arbitration answer being filed.

(1) Parties on one side of an arbitration proceeding may not challenge the arbitrator selected by the opposing side.

(2) Parties to an arbitration proceeding are responsible for the costs of the arbitrator they select.

(c) *Selecting the neutral arbitrator.* The Board shall provide the parties with a

list of five neutral arbitrators within 20 days of an arbitration answer being filed. When compiling a list of neutral arbitrators for a particular arbitration proceeding, the Board will conduct searches for arbitration experts by contacting appropriate professional arbitration associations. The parties will have 14 days from the date the Board provides them with this list to select a neutral arbitrator using a single strike methodology. The complainant will strike one name from the list first. The respondent will then have the opportunity to strike one name from the list. The process will then repeat until one individual on the list remains, who shall be the neutral arbitrator.

(1) The parties are responsible for conducting their own due diligence in striking names from the neutral arbitrator list. The final selection of a neutral arbitrator is not challengeable before the Board.

(2) The parties shall split the cost of the neutral arbitrator.

(3) The neutral arbitrator appointed through the strike methodology shall serve as the head of the arbitration panel and will be responsible for ensuring that the tasks detailed in §§ 1108.7 and 1108.9 are accomplished.

(d) *Use of a single arbitrator.* Parties to arbitration may request the use of a single-neutral arbitrator. Requests for use of a single-neutral arbitrator must be included in a complaint or an answer as required in § 1108.5(a)(1). Parties to both sides of an arbitration dispute must agree to the use of a single-neutral arbitrator in writing. If the single-arbitrator option is selected, the arbitrator selection procedures outlined in § 1108.6(c) shall apply.

(e) *Arbitrator incapacitation.* If at any time during the arbitration process a selected arbitrator becomes incapacitated or is unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by either of the following processes:

(1) If the incapacitated arbitrator was appointed directly by a party to the arbitration, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in § 1108.6(b).

(2) If the incapacitated arbitrator was the neutral arbitrator, the parties

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shall promptly inform the Board of the neutral arbitrator's incapacitation and the selection procedures set forth in § 1108.6(c) shall apply.

### § 1108.7 Arbitration procedures.

(a) *Arbitration evidentiary phase timetable.* Whether the parties select a single arbitrator or a panel of three arbitrators, the neutral arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirement that this evidentiary phase shall be completed within 90 days from the start date established by the neutral arbitrator.

(b) *Written decision timetable.* The neutral arbitrator will be responsible for writing the arbitration decision. The unredacted arbitration decision must be served on the parties within 30 days of completion of the evidentiary phase. A redacted copy of the arbitration decision must be served upon the Board within 60 days of the close of the evidentiary phase for publication on the Board's Web site.

(c) *Extensions to the arbitration timetable.* Petitions for extensions to the arbitration timetable shall only be considered in cases of arbitrator incapacitation as detailed in § 1108.6(e).

(d) *Protective orders.* Any party, on either side of an arbitration proceeding, may request that discovery and the submission of evidence be conducted pursuant to a standard protective order agreement.

### § 1108.8 Relief.

(a) *Relief available.* An arbitrator may grant relief in the form of monetary damages to the extent they are available under this part or as agreed to in writing by the parties.

(b) *Relief not available.* No injunctive relief shall be available in Board arbitration proceedings.

### § 1108.9 Decisions.

(a) *Decision requirements.* Whether by a panel of arbitrators or a single-neutral arbitrator, all arbitration decisions shall be in writing and shall contain findings of fact and conclusions of law. The neutral arbitrator shall pro-

vide an unredacted draft of the arbitration decision to the parties to the dispute.

(b) *Redacting arbitration decision.* The neutral arbitrator shall also provide the parties with a draft of the decision that redacts or omits all proprietary business information and confidential information pursuant to any such requests of the parties under the arbitration agreement.

(c) *Party input.* The parties may then suggest what, if any, additional redactions they think are required to protect against the disclosure of proprietary and confidential information in the decision.

(d) *Neutral arbitrator authority.* The neutral arbitrator shall retain the final authority to determine what additional redactions are appropriate to make.

(e) *Service of arbitration decision.* The neutral arbitrator shall serve copies of the unredacted decision upon the parties in accordance with the timetable and requirements set forth in § 1108.7(b). The neutral arbitrator shall also serve copies of the redacted decision upon the parties and the Board in accordance with the timetable and requirements set forth in § 1108.7(b). The arbitrator may serve the decision via any service method permitted by the Board's regulations.

(f) *Service in the case of an appeal.* In the event an arbitration decision is appealed to the Board, the neutral arbitrator shall, without delay and under seal, serve upon the Board an unredacted copy of the arbitration decision.

(g) *Publication of decision.* Redacted copies of the arbitration decisions shall be published and maintained on the Board's Web site.

(h) *Arbitration decisions are binding.* By arbitrating pursuant to these procedures, each party agrees that the decision and award of the arbitrator(s) shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in § 1108.11.

### § 1108.10 Precedent.

Decisions rendered by arbitrators pursuant to these rules may be guided by, but need not be bound by, agency precedent. Arbitration decisions shall

have no precedential value and may not be relied upon in any manner during subsequent arbitration proceedings conducted under the rules in this part.

#### § 1108.11 Enforcement and appeals.

(a) *Petitions to modify or vacate.* A party may petition the Board to modify or vacate an arbitral award. The appeal must be filed within 20 days of service of a final arbitration decision, and is subject to the page limitations of § 1115.2(d) of this chapter. Copies of the appeal shall be served upon all parties in accordance with the Board's rules at part 1104 of this chapter. The appealing party shall also serve a copy of its appeal upon the arbitrator(s). Replies to such appeals shall be filed within 20 days of the filing of the appeal with the Board, and shall be subject to the page limitations of § 1115.2(d) of this chapter.

(b) *Board's standard of review.* On appeal, the Board's standard of review of arbitration decisions will be narrow, and relief will be granted only on grounds that the award reflects a clear abuse of arbitral authority or discretion or directly contravenes statutory authority. Using this standard, the Board may modify or vacate an arbitration award in whole or in part.

(1) Board decisions vacating or modifying arbitration decisions under the Board's standard of review are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(2) Nothing in these rules shall prevent parties to arbitration from seeking judicial review of arbitration awards in a court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. 9-13, in lieu of seeking Board review.

(c) *Staying arbitration decision.* The timely filing of a petition for review of the arbitral decision by the Board will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(d) *Enforcement.* Parties seeking to enforce an arbitration decision made pursuant to the Board's arbitration program must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. 9-13.

#### § 1108.12 Fees and costs.

(a) *Filing fees.* When parties use the Board's arbitration procedures to resolve a dispute, the party filing the complaint or an answer shall pay the applicable filing fee pursuant to 49 CFR part 1002.

(b) *Party costs.* When an arbitration panel is used, each party (or side to a dispute) shall pay the costs associated with the arbitrator it selects. The cost of the neutral arbitrator shall be shared equally between the opposing parties (or sides) to a dispute.

(c) *Single arbitrator method.* If the single arbitrator method is utilized in place of the arbitration panel, the parties shall share equally the costs of the neutral arbitrator.

(d) *Board costs.* Regardless of whether there is a single arbitrator or a panel of three arbitrators, the Board shall pay the costs associated with the preparation of a list of neutral arbitrators.

#### § 1108.13 Additional parties per side.

Where an arbitration complaint is filed by more than one complainant in a particular arbitration proceeding against, or is answered or counter-claimed by, more than one respondent, these arbitration rules will apply to the complainants as a group and the respondents as a group in the same manner as they will apply to individual opposing parties.

### PART 1109—USE OF MEDIATION IN BOARD PROCEEDINGS

Sec.

1109.1 Mediation statement of purpose, organization, and jurisdiction.

1109.2 Commencement of mediation.

1109.3 Mediation procedures.

1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

AUTHORITY: 49 U.S.C. 721(a) and 5 U.S.C. 571 *et seq.*

SOURCE: 78 FR 29083, May 17, 2013, unless otherwise noted.

#### § 1109.1 Mediation statement of purpose, organization, and jurisdiction.

The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever